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[ORIGINAL CIVIL JURISDICTION]
HYNDMAN-JONES, J.
December 24, 1903.
[APPELLATE JURISDICTION.]
COX, C.J. and LAW, J.
April 20, 1904.

RE CHOP KEE CHIANG

[SINGAPORE BANKRUPTCY No. 28 of 1902]

Bankruptcy Ordinance 1883 S. 43(1) and (2)—Bankruptcy Ordinance Amendment Ordinance 1896—retention by execution creditor of benefit of his execution.

Held by Hyndman-Jones, J.

An execution creditor is not entitled to retain the benefit of his execution as against the Official Assignee if the judgment debtor is subsequently adjudged bankrupt and any proceeds of the execution received by him must be paid by him to the Official Assignee.

Held on Appeal.

By Law, J. that the above is a correct statement of the law.

By Cox, C.J. (diss.) that the above is not a correct statement of the law and that the execution creditor is entitled to retain the benefit of his execution.

The Court of Appeal consisting of two Judges not agreeing the Judgment of Hyndman-Jones, J. stands and stands as the Judgment of the Court of Appeal.

Motion.

In Singapore Suit 429 of 1901 Chop Moey Kiat on the 12th February 1902 recovered Judgment against Chop Kee Chiang for the sum of $1,894-99 and costs. Messrs. Braddell Brothers were the Plaintiffs' Solicitors. On the 13th February 1902 execution was levied by seizure of the property of Chop Kee Chiang and such property was sold on the 20th February 1902. On the 7th March 1902 the Sheriff paid over to Messrs. Braddell Brothers as the Solicitors for the Judgment creditors the sum of $389-50 being part of the proceeds of the execution. On the 6th June 1902 Chop Moey Kiat presented a bankruptcy petition against Chop Kee Chiang, the act of bankruptcy alleged being that execution issued against them had been levied by the seizure of their property in the abovementioned action. On the 21st May 1903 a Receiving Order was made against Chop Kee Chiang on this petition and later on the 27th August 1903 one Teng Soh Chun (a partner in or proprietor of Chop Kee Chiang) was adjudged bankrupt. Throughout the whole proceedings Messrs. Braddell Brothers acted for Chop Moey Kiat. In fact the sum of $389-50 was less than the amount of Messrs. Braddell Brothers' taxed costs and the whole amount had been retained by them to account of their costs.

The Official Assignee now moved the Court for an Order that Messrs. Braddell Brothers do pay over to him the sum of $389-50 received by them from the Sheriff on the 7th March 1902.

Official Assignee (Applicant) in person.

R. W. Braddell for Respondents.

Cur. Ad. Vult.

HYNDMAN JONES, J.—The facts of the case appeared in the affidavit of the Official Assignee.

The available Act of Bankruptcy, viz., the levying of execution by seizure, *and by seizure only* took place on the 13th February 1902; the execution creditor had notice of the Act of Bankruptcy because he himself caused it: and the Bankruptcy Ordinance Section 43 (1) & (2) provides that he shall not be entitled to retain the benefit of his execution against the Official Assignee unless he has completed the execution by *seizure and sale* before notice of the commission of an available Act of Bankruptcy: this he was clearly unable to do and the title of the Official Assignee, relating back to the time of the Act of Bankruptcy being committed on which the Receiving Order is made, must therefore prevail.

It was said, however, that *ex parte Villars, In re Rogers*, L. R. 9 Ch. 432 helped the execution creditor: that was a case decided under the Bankruptcy Act of 1869 in which a section similar to the one I have just quoted does not appear. The Judges in that case recognised the hardship of depriving a diligent creditor of the fruits of his diligence, and they said that a Judgment creditor by levying had a perfectly good common law security unless his rights were expressly displaced by Statute. Had the words "and sale" in Section 4(c) of our Ordinance not been deleted, or had the words "and sale" in Section 43(2) of our Ordinance been deleted, the reasoning in the case of *ex parte Villars, In re Rogers* might have been applied to the present case with more chance of success although there would still have been the difficulty that by Section 11 of the Bankruptcy Act of 1869 the title of the *Official Assignee** relates back to the time when the Act of Bankruptcy on which the petition is founded is *completed* whereas, by our Ordinance the title relates back to the time when the act of Bankruptcy is *completed*.

As was said by Vaughan Williams, J. in the case of *Figg* v. *Moore*, 1 Manson 404, adopting the reasoning of James, L. J. in *ex parte Villars* "In such a case as *ex parte Villars* the act of Bankruptcy is not committed until immediately after the completion of the transaction on which it is founded....." Here (that is in

* *Editorial Note*—This must be a clerical error and ought to read "Trustee in Bankruptcy."

Figg v. *Moore*) the common law right of the execution creditor is qualified by section 45 of the Bankruptcy Act 1883" and section 45 is reproduced in our Ordinance in section 43 (1) and (2). As the law stands therefore it excludes the right of the creditor in such a case as this as against the right of the Official Assignee.

It was argued that this could not be said to have been the intention of the Legislature, and that the Court should act on what it might well conceive to have been the true intention.

I was unable to take that view: the language of the Ordinance is plain, and the result arrived at is also plain.

As Jervis, C. J. pointed out in *Abley* v. *Dale*, 20 L. J. C. p.235 "If the precise words used are plain and unambiguous we are bound to construe them in their ordinary sense, even though it does lead to an absurdity or manifest injustice. Words may be modified or varied where their import is doubtful or obscure, but we assume the functions of legislators when we depart from the ordinary meaning of precise words used merely because we see, or fancy we see, an absurdity or manifest injustice from an adherence to their literal meaning."

From this decision the Respondents appealed. The Appeal came on for hearing before a Court of Appeal consisting of Cox, C. J. and Law, J.

R. W. Braddell for Appellants.

Delay for Respondent.

COX, C. J.—The Respondent does not deny, and there is clear authority for saying that under Section 43 of the Bankruptcy Ordinance, taken by itself, the creditor would be entitled to retain the proceeds of the execution, but it is contended for the Official Assignee that the right is taken away by the Bankruptcy Amendment Ordinance 1896 which makes a seizure an act of Bankruptcy. It is argued that the seizure being an act of Bankruptcy the creditor must be said to have had notice of an act of Bankruptcy before the sale, and therefore he could not validly complete the execution under section 43. In support of this view *Figg* v. *Moore*, 1894, 2 Q. B. 690, was quoted. The case is an important one and a binding authority if it is applicable but I do not think it is—it proceeds upon the Bankruptcy Act of 1890 which creates a new act of Bankruptcy resulting from the circumstance that after the seizure the Sheriff remains in possession for 21 days—held that the debtor thereby committed an act of Bankruptcy of which the creditor acquired notice through the Sheriff. In our case the act of Bankruptcy is the seizure itself and nothing else and the real question upon which I think the whole case turns is, "Is this act of Bankruptcy void against the Official Assignee?" If it is valid, the creditor acquires a right to the goods—they are taken out of the possession of the debtor and held by the Sheriff, to be sold in satisfaction of the Judgment debt, for the creditor —and when the Ordinance says that he will lose that right by acquiring notice of an available act of Bankruptcy, it must mean some act other than the seizure itself. For it would not be logical to say the seizure gives a right but notice of the seizure immediately cancels that right—the creditor by seizing obtains a lien upon the goods, but because he knows that he is seizing he loses that lien. It seems manifest that if the seizure creates a right, the *act* which destroys that right must be something *other* than the *seizure* itself. One might say, as was said for the Trustee in *Ex parte Villars*, 9 Ch. 433, "All *acts* of Bankruptcy are void and therefore the seizure was void and the creditor took no right in the goods" (see argument of De Gex, Q. C. p.435). But if we once find that the Bankruptcy Ordinance does *not* avoid an execution by seizure, then we must as a necessary consequence accept the conclusion arrived at in *Ex parte Villars*—and say "if the execution creditor had no notice of some other act of Bankruptcy.....he is entitled to the proceeds of the sale."

Now I think it clear that in the Bankruptcy Law, an execution by seizure though an act of Bankruptcy, is not made void against the Assignee —*Ex parte Villars* is a clear authority on the point. There Lord Cairns pointed out the distinction between "acts of Bankruptcy done by the debtor himself" which may be fairly avoided and reduced, so as to bring back into the general estate, the property affected by them, "and" an execution levied against the goods of a trader by his creditor, which is the act not of the trader but of the creditor and the creditor is on his part is doing nothing which is censurable either morally or legally. He is simply using the process of law which he is entitled to use and nothing short of express words would in my opinion be adequate to cut down or deprive him of the effect of an execution which he was entitled as of right to put in force." The decision in the case was: "an execution levied by seizure and sale of a trader's goods, although an act of Bankruptcy, is not for that reason necessarily a void proceeding, and if the creditor had no notice of a prior act of Bankruptcy he is entitled to the proceeds of the sale, notwithstanding a supervening Bankruptcy." In the same manner I may say although execution by *seizure* is made an act of Bankruptcy by the Ordinance of 1896, it is not for that reason void. But the Ordinance itself shows it is not void—section 45(3) provides "an execution levied by seizure and sale on the goods of a debtor is not invalid by reason only of its

being an act of Bankruptcy," it is true the inference which is drawn applies only to the purchaser of the goods, but the principle is none the less clearly expressed.

The argument on behalf of the Official Assignee resolves itself to this:—the Legislature by the Bankruptcy Ordinance 8 of 1896 intended to take away the rights of an execution creditor whenever a Bankruptcy petition is presented within six months of the execution—and though it has not said so in express words, such is the legal effect of the enactment. The members of the Legislative Council who voted for the Ordinance would probably be surprised to hear that they have passed a law making a judgment creditor who has *bona fide* seized the goods of his debtor and thus obtained payment of his debt liable to refund what he has received to the Official Assignee, if the debtor subsequently becomes bankrupt. But I do not think such is the legal effect of the Ordinance. *Ex parte Villars* is an authority against the contention of the Official Assignee. The Bankruptcy Act of 1869 had made seizure and sale "an act of bankruptcy, just as our Ordinance of 1896 has made" seizure an act of Bankruptcy, but in *Ex parte Villars* it was held the Amendment had not the effect of cancelling the right of the execution creditor to retain the proceeds of the execution. For the same reason in this case it may be said the Amendment effected by the Ordinance of 1896 does not take away the creditor's right.

I am of opinion accordingly that this appeal should be allowed, but as Mr. Justice Law has arrived at a different conclusion, the decision of the Court below must stand and the appeal be dismissed.

LAW, J.—This case is one of considerable difficulty and importance. The question is what effect we are to give to the provisions of section 43(1) of "The Bankruptcy Ordinance 1888" in view of the provisions of section 3 of "The Bankruptcy Ordinance Amendment Ordinance 1896," by which the words "and sale," were struck out of section 4(1) of the principal Ordinance.

Now we have had a great deal of argument addressed to us on the subject, but I think really the question must be decided, in conformity with the decision in *Figg* v. *Moore*, L. R. Q. B. 1894 Vol. II p.690, which was approved of in "*Trustee of John Burns—Burns* v. *Brown*, L. R. (1895) 1 Q. B. p.324; and here I would point out that in the case of *Figg* v. *Moore*, there was no actual act on the part of the debtor affecting the question to be decided, further or other than in the present case, for the granting of 21 days delay cannot, I think, be regarded as an act of the debtor, it was I think either an act of the creditor, or of the Sheriff, who for the purposes of seizure and sale, may I suppose be regarded as an agent of the creditor, but certainly not as the agent of the debtor.

In the case of *Figg* v. *Moore*, Mr. Justice Vaughan Williams had before him, the provisions of section 45 of the Bankruptcy Act 1883, which corresponds to section 43 of the Bankruptcy Ordinance 1888, and section 168 of the Act defining "available act of bankruptcy," which corresponds to section 2 of our Ordinance, he also had before him section 1 of the Bankruptcy Act 1890 which alters the law as to what constituted the commission of an act of Bankruptcy, and provided that a debtor commits an act of Bankruptcy, "if execution against him has been levied by seizure of his goods under process in an action in any Court or in any civil proceedings in the High Court, and the goods have been either sold or held by the Sheriff for 21 days." Now this provision of section 1 of the Act of 1890 altered the law somewhat in the direction of our Ordinance as amended, but whereas here the seizure alone became an act of Bankruptcy, in England to constitute an act of Bankruptcy, it was necessary either that the goods seized should also be sold, or that they should be held by the Sheriff for 21 days.

Under the circumstances of *Figg* v. *Moore* Mr. Justice Vaughan Williams was clear, that the creditor having seized the debtor's goods, and the Sheriff having detained them for 21 days, the creditor had notice of an available act of Bankruptcy, and had lost his common law rights. On this authority it seems to me it might be held, that under our law, the creditor having seized the debtor's goods, thereby got notice of an available act of Bankruptcy, and lost his common law rights, though no doubt retaining I think a qualified right which, if not lost in the meantime, might become absolute after the period of limitation hereinafter referred to. Perhaps, however, a better way really to put the matter is, that the seizure and notice of it to the creditor must be regarded as simultaneous, and that therefore a creditor does not now acquire the old common law rights under a seizure, but only a qualified right such as I have mentioned above.

It may seem that the above view of the case is hard upon creditors here, but I suppose the same may be said of the decision in *Figg* v. *Moore*; there as the result of the delay granted, the debtor succeeded in paying off the creditor who had seized, yet as the result of having granted the delay, which produced this no doubt desirable result, the creditor lost what he had recovered from the debtor. I do not, however, think that the case here is quite so hard against creditors, as Mr. Braddell seemed to argue, for it seems to me that under the provisions of section 41 of our Bankruptcy Ordinance, the Bankruptcy

would only relate back to a certain limited time, and, after that period, the creditor who had seized would be protected. The creditor would in England also after a time I think obtain a somewhat similar protection.

By adopting the views I have set out above, we are able to act on the ordinary meaning of the words of the Ordinance; I think too it is clear, that when section 4 of the Bankruptcy Ordinance 1888 was amended, by making mere seizure an act of Bankruptcy, this was done with the intention of benefiting the general body of creditors, and if the Ordinance is construed as I think it should be, there can be no doubt the general body of creditors will be benefited. Then it was foreseen I think, that the result of the alteration of the law would be, that individual creditors would suffer, and accordingly the new section 4 of section 44 was passed by the Bankruptcy Amendment Ordinance 1896, to provide some compensation. As then I think the Legislature when the Amending Ordinance of 1896 was passed intended to confer a benefit on the general body of creditors, and foresaw that individual creditors would sometimes suffer, I see nothing to justify us in departing from the ordinary meaning of the words used in the Ordinance. We cannot I think have any right to say, no doubt the Legislature did intend to benefit the general body of creditors, but not to the extent effected by the words used if read in their ordinary meaning, or to say, no doubt the Legislature foresaw that individual creditors would sometimes be damnified, but they cannot have foreseen that a creditor under the circumstances and in the position of the creditor in this case, would be affected.

I do not think the result arrived at by construing the Ordinance in the way I propose can be said to be either so absurd or so certainly contrary to the manifest intention of the Legislature, that we would be justified in construing the Ordinance in any way other than one similar to that in which the law was construed in *Figg* v. *Moore*. I may add that I think the passages to which we were referred, in *River Wear Commissinoers* v. *Adamson*, L. R. 2 App. Cases at p.764, and in *Ex parte Walton, In re Lewis*, L. R. 17 Ch. Div. at pp.750 and 751, tend rather to confirm the view I have adopted than the contrary.

In my opinion for the reasons which I have given, the order made in the Court below must stand, and this appeal should be dismissed.

Appeal Dismissed.

Solicitors for Appellants—*Braddell Bros.*

Solicitors for Respondent—*Sisson & Delay.*

[ORIGINAL CIVIL JURISDICTION]

WHITLEY, J.

October 6, 1924.

[APPELLATE CIVIL JURISDICTION]

SHAW, C.J., BARETT-LENNARD & DEANE, JJ.

February 26, 1925.

RE CHOPS LOH BAN CHUAN & CHUAN BEE *EX PARTE* LIM ENG HOE

[PENANG BANKRUPTCY No. 45 of 1924]

Ordinance No. 44 (Bankruptcy)—Order to show cause under Sec. 114(c) — Procedure necessary to lead to order for committal.

Held (i) upon an order to show cause under section 114(c) of Ordinance No. 44 (Bankruptcy) why he should not be committed to prison the debtor is entitled to have the charge against him put into writing and to be represented by Counsel.

Also Held (Deane, J. dissenting) that a Judge cannot act *ex proprio motu* under the section but an application should be made to the Court on motion as provided for in the Bankruptcy Rules. Section 114 of Ordinance No. 44 (Bankruptcy) is a highly penal provision and must be construed as strictly as its language justifies in the interest of the debtor.

Khoo Seok Wan v. *Sarkies & Johannes*, 11 S.S.L.R. 19 and *Re Chua Yew Chip, Chop Ho Lee, Exp. Chop Sim Tye*, Bankruptcy No. 23/01 discussed.

Appeal from an order of Whitley, J., committing the bankrupt to prison for one month.

The bankrupt was unrepresented before the Court of first instance.

The Judgment of M. H. Whitley, J., was as follows:—

WHITLEY, J.—The appellant was adjudicated bankrupt on the 18th August, 1924. Up to that time he had been carrying on business both as a druggist and tobacconist. The public examination was commenced on the 12th September. In adjourning it to the 15th September I warned appellant that I should probably call on him to shew cause why he should not be committed to prison for having contracted debts without having any reasonable ground of expectation of being able to pay them. The public examination was concluded on the 15th September and I at once called upon him to shew cause. In doing so I intimated that the particular debts which I had in mind were those incurred to Indian moneylenders during the period between the month of February, 1924, and the adjudication order. I referred to a list put to him in the course of the public examination by the Assistant Official Assignee and admitted in evidence as Exhibit "A."

I roughly totalled the fresh liabilities appearing on the list, as distinct from the old liabilities renewed, and pointed out to him that, when the more recent in date of these debts were contracted, he could hardly have had any expectation of ever discharging them. The following table shews